Supreme Court, U.S.
FILED
APR 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-602

In The

Supreme Court of the United States

October Term, 1987

—o—

WILLIAM A. KILPATRICK, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

—o—

REPLY BRIEF FOR PETITIONERS WILLIAM A. KILPATRICK, DECLAN J. O'DONNELL and SHEILA C. LERNER

—o—

William A. Cohan *
Jennifer A. Greene
COHAN & GREENE
1801 York Street
Denver, Colorado 80206
(303) 321-0999

Attorneys for Petitioners William A. Kilpatrick Declan J. O'Donnell and Sheila C. Lerner

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
POINT I	
The Government's First Major Premise Misstates the Law.	1
POINT II	
The Government's Second Major Premise Trivializes Willful, Repeated and Pervasive, Prosecutorial Misconduct by Distortion and Omission.	6
CONCLUSION	10
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page:

CASE:

Ballard v. United States, 329 U.S. 187 (1946) 3

Delaware v. Van Arsdall, 475 U.S. —, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) 7

Ex parte Bain, 121 U.S. 1 (1887) 10

In Re Sealed Case, 838 F.2d 476 (D.C. Cir. 1988) 5

Massiah v. United States, 377 U.S. 201 (1964) 9

McNabb v. United States, 318 U.S. 322 (1943) 3

Stirone v. United States, 361 U.S. 212 (1960) 10

Taylor v. Louisiana, 419 U.S. 522 (1975) 3

United States v. Hasting, 461 U.S. 499 (1983) 2

United States v. Mechanik, 475 U.S. 66 (1986) 5, 6, 10

United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979), *cert. denied*, — U.S. —, 106 S.Ct. 3294, 92 L.Ed.2d 709 (1986) 2

Vasquez v. Hillery, 474 U.S. 254 (1986) 1, 3

Young v. United States ex rel. Vuitton et Fils, S.A., — U.S. —, 107 S.Ct. 2124 (1987) 2, 3, 4, 5

STATUTES AND RULES:

18 U.S.C. 241 ..... 4, 8, 9

18 U.S.C. § 1512 4

18 U.S.C. § 1512(b)(1) 8, 9

26 U.S.C. § 6103 9

26 U.S.C. § 7213 ..... 4, 9

26 U.S.C. § 7214 ..... 4, 8

TABLE OF AUTHORITIES—Continued

Page:

28 U.S.C. § 49 4

28 U.S.C. § 591 4

28 U.S.C. § 592 4

28 U.S.C. § 593 4

28 U.S.C. § 594 4

28 U.S.C. § 595 4

28 U.S.C. § 596 4

28 U.S.C. § 597 4

28 U.S.C. § 598 4

28 U.S.C. § 2111 2

Federal Rules of Criminal Procedure

6(d) 5, 6

32(a) 2

REPLY BRIEF FOR PETITIONERS WILLIAM A. KILPATRICK, DECLAN J. O'DONNELL and SHEILA C. LERNER

INTRODUCTION

To fully apprehend the significance of the lengthy list of incidents of prosecutorial misconduct established in this case and to appreciate the impact of the Court's disposition of this case on the future administration of justice, petitioners invite the Court's attention to an ancient apothegm of Roman origin: *gutta lapidem carvat non vi sed saepe cadendo*—the droplet carves the rock not by force, but by falling often. As Circuit Judge Seymour observed in her well reasoned dissent below, though it is difficult to quantify the cumulative corrosion caused by the stream of heinous government misconduct on this grand jury's decision-making process, the erosion of the integrity of the criminal justice system is readily apparent. The threat to the integrity of our criminal justice system caused and revealed by this case compels reversal of the Court of Appeals to stem the flood of misconduct and disintegrating erosion that will surely ensue if this Court fails to stop that destructive flow by damming it through dismissal of the indictment.

POINT I

THE GOVERNMENT'S FIRST MAJOR PREMISE MISSTATES THE LAW

The government's first major premise is a misstatement of the law; the contention that "[a]n indictment may not be dismissed for grand jury abuse in the absence of prejudice to the defendant" (Government's brief, hereinafter "GB", at 9) is obviously incorrect, since otherwise this Court's decisions in *Vasquez v. Hillery*, 474 U.S. 254 (1986) and its predecessors would have been erroneous.

Although it is possible to theoretically distinguish *Young v. United States ex rel. Vuitton et Fils, S.A.*, — U.S. —, 107 S.Ct. 2124 (1987) on the technical ground that the criminal convictions therein reversed were the product of a judicial accusation rather than a grand jury indictment, the distinction is pure sophistry in the context of identifying circumstances warranting the exercise of supervisory powers to dismiss criminal charges and reverse convictions in the absence of proof of prejudice.

The asserted conflict between dismissal of an indictment absent proof of prejudice and both 28 U.S.C. § 2111 and F.R.Crim.P. 52(a) is non-existent for the same reason, i.e., exercise of supervisory powers is a remedy for prosecutorial misconduct when necessary to preserve the integrity of the judicial process and deter illegal conduct, even when the violations do not establish prejudice to the defendant(s). *United States v. Hasting*, 461 U.S. 499 (1983). Only where a court exercised its supervisory powers in the absence of demonstrated prejudice and without finding: (1) a substantial threat to the integrity of the judicial process and/or (2) that the misconduct "was something other than an isolated incident unmotivated by sinister ends" would the principles of F.R.Crim. P. 52(a) and 28 U.S.C. § 2111 be violated. *United States v. Serubo*, 604 F.2d 807, 817 (3rd Cir. 1979), *cert. denied*, — U.S. —, 106 S.Ct. 3294, 92 L.Ed.2d 709 (1986).

In the discussion of its assertion that "[t]his Court's decisions compel the conclusion that an indictment may not be dismissed for procedural irregularities in the grand jury in the absence of prejudice" (GB at 15), the government does not even attempt to distinguish *Young v. United States ex rel. Vuitton et Fils, S.A.*, *supra*, and *Vasquez v. Hillery*, *supra*. Instead, the government's brief invites the reader to:

> . . . compare *Young v. United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987), slip op. 21-26 (plurality opinion)(appointment of interested prosecutor raised doubt that prosecution could be conducted in disinterested manner, created appearance of impropriety to which harmless error analysis would not have been sensitive, and did not lend itself to ready assessment of its effects on the prosecution); *Vasquez v. Hillery*, 474 U.S. 254, 260-264 (1986)(racial discrimination in selection of grand jurors struck at fundamental values of judicial system and society, and was not susceptible to evaluation of resulting harm) [GB at 18].

Petitioners proffer a comparison. In *Young* considerations warranting the exercise of supervisory power were: (1) the appearance of impropriety to which harmless error analysis is not sensitive, and (2) circumstances not conducive to realistic assessment of the likelihood of prejudice. In *Vasquez* (and in *McNabb v. United States*, 318 U.S. 332 (1943); *Ballard v. United States*, 329 U.S. 187 (1946); and *Taylor v. Louisiana*, 419 U.S. 522 (1975)), the pivotal principle for invoking supervisory power involved threats to the fundamental values of the judicial system and society, which are not susceptible to evaluation of resulting harm.

The case at bar concerns scores of violations of the law committed by three prosecutors employed by the United States Department of Justice and dozens of additional infractions by several criminal investigators employed by the United States Department of the Treasury. Numerous

episodes euphemistically identified as "misconduct" and "improprieties" constitute felonies, 18 U.S.C. §§ 241 and 1512, 26 U.S.C. §§ 7213 and 7214. It is impossible to conclude that this Saturnalia of prosecutorial excesses, which included but was not limited to "grand jury abuse," does not create an appearance of impropriety rising beyond the level reached in *Young* to which the Tenth Circuit's harmless error analysis is equally insensitive; nor does the instant "misconduct" lend itself to assessment of its effects on the grand jury's deliberations any more readily than the ethical dilemma presented in *Young*, as noted by both the trial court and the dissent below. Finally, the threat to the fundamental values of the judicial system and society presented by the instant "willful, pervasive and egregious governmental misconduct" (Pet. App. 40a-42a), a characterization generous to the government, constitutes a danger to the fundamental values of society and the judicial system equal to racial discrimination in the selection of grand jurors. Tyranny is no less atrocious merely because it is color blind.

To support its argument that proof of prejudice to the defendant is an absolute prerequisite to dismissing an indictment, the government avers that it "would be unsound as a matter of policy [to] . . . dismiss [] an indictment for *procedural irregularities in the grand jury* [emphasis added to a euphemism that would make George Orwell gasp]. (GB at 22). In recently sustaining a constitutional challenge to criminal prosecutions pursuant to the Ethics in Government Act (28 U.S.C. §§ 49, 591-598) based on the separation of powers, the Court of Appeals for the District of Columbia discussed these matters of

policy, *In Re Sealed Case*, 838 F.2d 476, 487-489 (D.C. Cir. 1988):

> Authority to prosecute an individual is that government power which most threatens personal liberty, for a prosecutor "has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." *Young v. United States ex rel. Vuitton et Fils, S.A.*, — U.S. —, 107 S.Ct. 2124, 2141, 95 L.Ed.2d 740 (1987). The Framers of the Constitution were justly fearful of this power.
>
> • • •
>
> It may well be that the constitutional framework is awkward or burdensome in particular cases, but, under this system, efficiency is knowingly sacrificed in various ways so that liberty may be protected. Therefore, a law [and *a fortiori* a rule excusing violations of law to the same end] whose purpose is to ensure a more efficient or more trustworthy means for the state to prosecute crime than that contemplated by the Constitution comes into this Court with a heavy burden. *See Bowsher v. Synar*, — U.S. —, 106 S.Ct. 3181, 3193-94, 92 L.Ed.2d 583 (1986).

The government mistakenly claims support for its "policy argument" in *United States v. Mechanik*, 475 U.S. 66 (1986) a case where only a single "procedural irregularity" consisting of one violation of F.R.Crim.P 6(d) produced a deeply divided Court. Justice Rehnquist's majority opinion suggests little likelihood that the Court would countenance the matastic expansion of harmless error analysis to excuse the prosecutorial lawlessness catalogued here. In fact, the Court included the following *caveat* in *Mechanik*, 475 U.S. 66, 72:

> We express no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of trial.

The several violations of Rule 6(d) in this case are far more serious than the one discussed in *Mechanik*. Furthermore, although several tandem appearances by IRS criminal investigators before this grand jury were not even attended by prosecutors, nor were they transcribed to enable us to determine what actually transpired, the 6(d) violations instanter constitute only one of nine broad categories of prosecutorial transgressions. It cannot be denied that the fulcrum for the Court's determination in *Mechanik* was the fact that review followed "a three-month trial conducted at enormous expense to the United States and the defendants." *Id.* at 69. The government fails to cite a single case involving *pre-trial* dismissal of an indictment, relying instead on *Mechanik*, which found the fact of a lengthy trial crucial to its *ratio decidendi*.

POINT II

THE GOVERNMENT'S SECOND MAJOR PREMISE TRIVIALIZES WILLFUL, REPEATED AND PERVASIVE, PROSECUTORIAL MISCONDUCT BY DISTORTION AND OMISSION

Under the rubric "[d]ismissal of the indictment would be inappropriate in this case even if an indictment may be dismissed without a showing of prejudice," (GB at 26), the government purports to enumerate and discuss the willful, repeated and pervasive prosecutorial misconduct found by two federal district judges and one dissenting circuit judge, i.e., the opinion of Chief Judge Holloway

of the Tenth Circuit, joined by district court Judge Bohanon, sitting by designation, constitutes the ruling of the Tenth Circuit below, notwithstanding the fact that three judges below have reached a contrary conclusion. By eisegesis, ellipsis, syllepsis, metonymy and catachresis, the government reduces a detailed account of prosecutorial lawlessness to "defects in the grand jury process" (GB at 9) and "procedural irregularities" (GB at 15).

Contrary to the government's argument, petitioners do not complain about misuse of the term "grand jury agent"; the misconduct disguised in this instance is the prosecution's willful and repeated misrepresentation as to the affiliation and bias of the "agents of the grand jury."[1] The grand jury was consistently reminded of the agents' uniquely created and described role and urged to rely upon the IRS special agents as their agents. These agents repeatedly expressed their "expert" opinions that

---

[1] This Court observed as recently as *Delaware v. Van Arsdall*, 475 U.S. —, 106 S.Ct. 1431, 1434, 89 L.Ed.2d 674 (1986), that the bias of a witness is 'always relevant as discrediting a witness and affecting the weight of his testimony.' The principle is implicated by the willful deception practiced upon the grand jury by Prosecutor Snyder and Special Agent Raybin on July 8, 1981 beginning at 9:11 a. m.:

> Whereupon, the following proceedings were had:
>
> MR. SNYDER: I would like to have him sworn in as an agent of the Grand Jury. What an agent of the grand jury means is to make very, very clear under the law that when he interviews people and he looks at this stuff, he is not looking at it so much as a special agent of the Criminal Investigation Division of the IRS, but he is looking at it as your agent and he is answerable to you and he is answerable to Rule 6. Do you recall Rule 6, the Grand Jury Secrecy?
>
> What it is, it is very, very plain and it states in what capacity he is operating in this investigation so there is no question about it. (JA-100).

the tax shelter arrangements at issue were illegal and these petitioners were guilty. (Pet. App. 52a-58a).

The remaining categories of misconduct set forth in the government's brief similarly misrepresent the record. "Presentation of summaries of evidence" (GB at 31) constitutes the elliptical substitution for findings by the district court (Pet. App. 76a-81a) that the purported summaries of evidence adduced before this grand jury were seriously false and misleading. This misconduct arguably constitutes felony violations, 18 U.S.C. § 241 and 26 U.S.C. § 7214(a)(7). (*See* Appendix).

"Mistreatment of an expert witness" (GB at 35) as found by all five judges below is rendered as "at worst a debate between two lawyers arising out of a disagreement as to legal theories . . ." (GB at 36). The intimidation of petitioners' tax law expert was sufficient to induce him to recant his testimony before the grand jury (G.J. Tr., Hjorth 7/20/82, 4:05 p.m.), leaving the unmistakable impression that his exculpatory analysis was false and had been purchased by petitioners. In this instance the prosecutor arguably committed felony witness intimidation proscribed by 18 U.S.C. § 1512(b)(1). (*See* Appendix).

"Granting informal immunity" (GB at 38), as the government phrases the issue, is followed by a discussion which omits the facts that (1) twenty-three (23) witnesses were beneficiaries of this procedure and (2) the testimony of at least one such witness was manipulated by the prosecutor's threats (Pet. App. 141a-142a), again arguably a felony, 18 U.S.C. § 1512(b)(1). The problem of prejudice posed by "[c]alling witnesses who asserted their privilege against compulsory self-incrimination" (GB at 39-41) is

camouflaged by the ensuing discussion's omission of the undisputed findings of record that (1) six of these witnesses were called after a grand juror candidly conceded that the grand jury was being prejudiced by the procedure and (2) the government falsely represented that petitioners were purchasing the witnesses' silence.

The "[a]lleged use of the grand jury to gather information for civil purposes" (GB at 43) is dismissed via reference to the following *non sequitur* provided by the appeals court: the grand jury's return of "an extensive indictment is probative evidence that it was not abused to obtain evidence for civil purposes." (GB at 43). But the record conclusively refutes this assertion. (Pet. App. 58a-64a; 88a-92a). The willful dissemination of this information constitutes a felony. 26 U.S.C. § 7213 (*See* Appendix).

"Disclosure of the identity of targets of the investigation" (GB at 46) along with the violation of *Massiah v. United States*, 377 U.S. 201 (1964) (GB at 49) and the imposition of secrecy obligations on two witnesses (GB at 47-49) could not have influenced the deliberations of the grand jury. But these illegal maneuvers were deliberately designed to injure petitioners and, in the case of the disclosures that petitioners were grand jury targets, succeeded in inflicting grave emotional and economic injury on petitioners. (26 U.S.C. § 6103, *see* Appendix). Obviously, harmless error analysis is not sensitive to this type of "prejudice" since it is not even considered. Willful disclosure of the identities of petitioners as grand jury targets constitutes the felonies of Unauthorized Disclosure of Information, 26 U.S.C. § 7213 (a)(1) and Conspiracy Against Right of Citizens, 18 U.S.C. § 241. (*See* Appendix). The *Massiah* violations may constitute felonies defined in 18 U.S.C. § 1512(b)(1) and (g). (*See* Appendix).

CONCLUSION

The Court held in *Stirone v. United States*, 361 U.S. 212, 218 (1960), that the grand jury was independent of either the prosecution or the judiciary and that the executive was powerless to initiate a criminal prosecution without the declaration that there is probable cause to support the indictment by an impartial grand jury after careful deliberation and strict adherence to rules designed as a means, not only of bringing to trial persons accused of public offense upon just grounds, but also as a means of protecting the citizen against unfounded accusation. *Ex parte Bain*, 121 U.S. 1, 11 (1887). As the Chief Justice observed in *Mechanik, supra*, at 71, "the moving finger writes; and, having writ, moves on." The independence of the grand jury is threatened. If this Court affirms the Tenth Circuit's decision, no accompanying exhortations, warnings or qualifications can prevent repetition of and citation to the events of this case. The imperative of judicial integrity and this Court's nomothetic function require reversal: actions speak lounder than words.

Respectfully submitted,

WILLIAM A. COHAN
Counsel of Record

COHAN & GREENE
1801 York Street
Denver, Colorado 80206
(303) 321-0999

Counsel for Petitioners
William A. Kilpatrick,
Declan J. O'Donnell and
Sheila C. Lerner

APPENDICES

18 U.S.C. Sec. 241. CONSPIRACY AGAINST RIGHTS OF CITIZENS

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;

• • •

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. Sec. 1512. TAMPERING WITH A WITNESS, VICTIM, OR AN INFORMANT

• • •

(b) Whoever knowingly uses intimidation . . . or engages in misleading conduct toward another person, with intent to—

(1) influence, delay or prevent the testimony of any person in an official proceeding; . . . shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

• • •

(f) in prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before

a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(g) There is extraterritorial Federal jurisdiction of an offense under this Section.

26 U.S.C. Sec. 6103. CONFIDENTIALITY AND DISCLOSURE OF RETURNS AND RETURN INFORMATION

(b) Definitions. For purposes of this section—

• • •

(2) Return information. The term "return information" means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense,

. . . .

26 U.S.C. Sec. 7213. UNAUTHORIZED DISCLOSURE OF INFORMATION

(a) Returns and return information.

(1) Federal employees and other persons. It shall be unlawful for any officer or employee of the United States . . . willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a felony punishable upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

26 U.S.C. Sec. 7214. OFFENSES BY OFFICERS AND EMPLOYEES OF THE UNITED STATES

(a) Unlawful acts of revenue officers or agents. Any officer or employee of the United States acting in connection with any revenue law of the United States—

• • •

(7) . . . who makes or signs any fraudulent . . . statement, or

• • •

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or

both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution.